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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-247

HELEN FOLEY, Petitioner

v.

STATE OF NEW JERSEY, Respondent

On Petition for Writ of Certiorari
to the Superior Court of New Jersey,
Appellate Division

PETITIONER'S REPLY MEMORANDUM

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STATEMENT OF THE CASE

Petitioner affirms the above as set forth in her Petition for Writ of Certiorari and incorporates it as part of this.

REPLY TO ARGUMENT

The rebuttal to respondent's argument is as follows:

1. Point One of respondent's argument is erroneous in that he has misapprehended the correct application of the law to the facts at issue. His reasoning is general and not specific.

Respondent states in his Brief in Opposition: (Rb4)

> "Petitioner contends that the notice she received apprising her that she had been charged with contempt of court.... was insufficient pursuant to the New Jersey Court Rules."

and then rebuts the alleged contention by argument and case listing to the effect that the notice received by petitioner was adequate and sufficient to comply with constitutional requirements in general, stating at (Rb5):

> " Respondent submits that the notice afforded petitioner in the instant case clearly satisfied the requirements of due process."

Petitioner's reply to the above is that the respondent's argument was addressed to the issue in general even though his conclusion was stated in terms of "the instant case." She is contending that the State of New Jersey has guaranteed a particular procedural form in its Court Rule 1:10-2 and since this particular matter is penal in nature she has a right to the proper operation of said procedure which is guaranteed by the Due Process Clause of the Fourteenth Amendment. (Goldberg v. Kelly, 397 U.S.254 (1969)) (Ppll) This point was raised in the Petition but not answered by respondent. In further reply, she is not claiming that the notice which she did receive (letter from the assignment judge) was an

insufficient notice - but that it was an improper notice under the State Court Rules and thus violated her constitutional rights. (Ppll-13)

At(Rb6,7) respondent seems to be arguing that the court below had proceeded under Rule 1:10-1, and he states:

> "The decisions of other New Jersey Courts, however, clearly indicate that the procedure referred to in R.1-10-2 was not required in the instant case."

and then continues for a full page with argument and case listings proving that a contempt committed in "the actual presence" of the court may be dealt with without an order to show cause and that the mailing of a letter to a judge or clerk of the court is such an "actual presence". But when he further states on (Rb7) that:

"The recent decision of State v. Sax, 139 N.J. Super.157,353 A2d 113 (App.Div.

1976), is directly on point and dispositive of the instant case."

he is in error because it is not directly on point and dispositive of the instant case for the following differences:

Sax Case	Instant Case
1. Letter addressed to Clerk of Municipal Court	1. Wording on parking ticket
2. Municipal judge found defendant guilty of contempt, summarily, himself.	2. Municipal judge forwarded the matter to another.
3. Defendant present at trial with attorney	3. Trial unattended by petitioner

(above facts listed in respondent's Statement of Facts and Argument)

He argues further, in the alternative, assuming that the proceedings should have been instituted under R.1:10-2 that in Van Sweringen v. Van Sweringen_, 22 N.J. 440,444, 126 A.2d 334 (1956)"the New Jersey Supreme Court stated that the crucial

emphasis in contempt proceedings should be placed upon notice and a fair hearing."

A search of that particular page does not reveal the wprd "crucial" being used but the following citation from the same page does show the context in which a similar clause was used. It is in pertinent part:

> "... only three issues demand consideration:
> 1. Is a sworn affidavit supporting an order to show cause why punishment should not be imposed upon the alleged contemnor a jurisdictional requisite? ....
>
> 1. ..... There has not been a uniform practice in this State nor the country at large in requiring a sworn statement reciting the facts upon which the alleged contempt is based. .... The rules of court relevant to criminal contempt do not express the requirement, ... and, as stated below, emphasis today is placed upon notice and a fair hearing. Katz was fully apprised of the charge against him and was afforded ample opportunity to prepare his defense. He was not denied a fair hearing through the absence of a sworn statement."

(underline added)

It is obvious from the above that an order to show cause was issued to the contemnor and that the underlined sentence concerning the non denial of a fair hearing was a reference to the lack of a sworn statement thereto, and not authority for dispensing with formal notice generally, as implied by respondent.

Respondent continues to interpret the Van Sweringen case stating: (Rb8)

> "The court in Van Sweringen, supra ruled that minor irregularities in the preliminary procedural steps do not justify a reversal unless some substantial prejudice is suffered by a defendant."

If, by this, he is implying that the lack of an order to show cause in the instant case is a minor irregularity, petitioner is unable to make the same interpretation. In fact, she gets the opposite impression from the same court's statement at 447:

> " Where, however, the contempt is not within the presence of the court, the course is to follow more rigidly the traditional demands of due process."

Petitioner further contends that the failure of the court to institute an order to show cause was not a minor irregularity - it was a jurisdictional flaw which the letter of the assignment judge could not cure. This is borne out by the following from the New Jersey Court Rules: (in pertinent part)

> "R.4:67-3. Service of Order to Show Cause
> If the order to show cause issues ex parte pursuant to R. 4:67-1a,(to all actions in which the court is permitted by rule or statute to proceed in a summary manner,...) no summons shall issue unless the court otherwise orders. Process shall be a copy of the order to show cause,.."

(underline added)

In conclusion, petitioner contends that this matter is not just one of local law wherein a state court has made a wrong

decision but involves a 14th Amendment due process right as a statutory entitlement, which respondent has not refuted.

2. Point II of respondent's argument is erroneous and irrelevant since it is addressed to an argument which petitioner never made.

It is headed:

> "Petitioner's guilt of contempt of court was established beyond a reasonable doubt." (Rb10)

Under which it begins:

> "Petitioner argues that her guilt of contempt of court was not established at the proceeding below. Specifically she contends that it was never demonstrated that she possessed the requisite intent to commit the contempt in question."

This is erroneous since petitioner never so argued in this Court. That would only have been an error of the state court and therefore not appealable as a federal question. What she did argue

in Point II of her Petition was that the holding of her trial (in absentia) under the circumstances of the case was a violation of the Due Process Clause in that she was not afforded an opportunity to present evidence in her own defense. The issue of intent was only cited as an example of such deprivation - not as an argument per se. Since respondent has not addressed himself to the real issue raised by petitioner, it must be assumed that it is because he has no argument. His entire argument in defense of the trial and conviction is irrelevant.

JURISDICTION

This is a case where the federal issue was raised at the inception of the appeal and the decision was based upon federal and non federal grounds but respondent

has not argued that the non federal ground is independent of the federal and adequate to support the judgment. Petitioner says that the federal question is unanswered.

CONCLUSION

In view of the fact that the issue has to do with basic constitutional rights and the decision will set a precedent on a statewide basis, the need for plenary review of the matter is urgent.

Helen Foley

Helen Foley, pro se

Dated 27 Sept. 1977